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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 93

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

THE STATE OF NORTH CAROLINA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (R. 634) is reported at 210 F. Supp. 675, and its final judgment is set forth at R. 658–659. The decision of the Interstate Commerce Commission (Division Three) (R. 10–18) is reported at 317 I.C.C. 255. The report and recommended order of the Commission's Hearing Examiner, dated October 27, 1961, are set forth at R. 25–47.

JURISDICTION

The judgment of the district court was entered on October 19, 1962 (R. 658). Separate notices of ap-

peal by the United States and the Commission were filed on December 17, 1962 (R. 664–667). Probable jurisdiction was noted on May 13, 1963 (R. 668). The jurisdiction of the Court upon appeal rests on 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether, under Section 13a(2) of the Interstate Commerce Act, the Commission may authorize the discontinuance of passenger trains operated within a State, where the trains are operated with reduced patronage and at a substantial out-of-pocket loss, without regard to whether freight operations over the particular line of railroad produce sufficient earnings so that the operation of the line as a whole makes an adequate contribution to overall company operations.

2. Whether the district court erred in rejecting the Commission's conclusion as to public convenience and necessity and in undertaking its own independent evaluation of the evidence.

STATUTE INVOLVED

The provisions of Section 13a(2) of the Interstate Commerce Act, 49 U.S.C. 13a(2), are reproduced in the Appendix, *infra*, pp. 40–41.

STATEMENT

The Southern Railway Company operates two deficit-producing passenger trains between Greensboro and Goldsboro, North Carolina. The distance be-

tween the two points is 129.1 miles. Train No. 16 operates eastbound in the morning from Greensboro to Goldsboro, and Train No. 13, consisting of the same equipment,[1] operates in the reverse direction in the late afternoon.

Pursuant to the provisions of Section 13a(2) of the Interstate Commerce Act, 49 U.S.C. 13a(2), the Southern Railway Company, on April 6, 1961, filed a petition with the Interstate Commerce Commission seeking authority to discontinue the service of passenger trains Nos. 13 and 16.[2] A hearing was held before an examiner and several protestants, including the State of North Carolina, appeared in opposition to the petition. On October 27, 1961, the examiner's detailed report was served (R. 25).

The examiner found that the operation of the trains resulted in a net loss to the Southern and that the discontinuance of the passenger service would result in annual savings "considerably in excess of $90,589

[1] The train equipment consists of a 1,500 horsepower diesel electric locomotive, a passenger coach, and a combination car for passengers, baggage and express. On the portion of the run between Raleigh and Greensboro, N.C., a sleeping car is provided for through service to passengers going to points beyond and north of Greensboro. This car is switched to other Southern passenger trains at Greensboro (R. 29).

[2] A previous effort by the Southern to obtain permission from the North Carolina Utilities Commission to drop these two trains was unsuccessful. The Utilities Commission's action denying the application was upheld by the Supreme Court of North Carolina in *State of North Carolina* v. *Southern Railway Company*, 254 N.C. 73, 118 S.E. 2d 21.

a year" (R. 39). He also found that the public demand for the service was slight, and had sharply declined since 1948, despite the high density of population in the area traversed by the two trains. Thus, in 1948 both trains carried 56,739 passengers, an average of 77.51 per trip, compared to 14,776 passengers in 1960 or an average of 20.19 per trip (R. 31).[3] The examiner found that adequate alternative means of transportation were available to the public.[4] Based upon these findings, the examiner concluded that the present and future public convenience and necessity permit the discontinuance of passenger trains 13 and 16 and that the continued operation of the trains would constitute an unjust and undue burden on the Southern's interstate operations and upon interstate commerce. Accordingly, he recommended that the petition be granted (R. 42).

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[3] From 1948 to 1960 the examiner found that total passenger revenues declined from $60,534, or an average passenger revenue of $82.70 per trip, to $21,135 or $28.87 per trip (R. 31).

[4] The alternate means of transportation include motor buses operating on several daily schedules either in "through" or "connecting" service between Greensboro, Raleigh, Durham and Goldsboro. Rail passenger service is available at four of the stations served by trains 13 and 16. The Seaboard Airline Railroad and the Atlantic Coast Line Railroad provide several scheduled passenger trains at Raleigh and at Goldsboro. Daily airline service is available from the Raleigh-Durham and Greensboro-High Point airports. In addition there are many highways available between the communities in the area served by the trains, one of which substantially parallels the line of railroad involved here (R. 31).

Upon the filing of exceptions and replies to the examiner's report, the matter was considered by Division 3 of the Commission, consisting of three Commissioners. The Division issued a report dated June 27, 1962 (R. 10) in which it set forth its views on the issues raised by the exceptions and also adopted the findings and conclusions of the examiner. The Division further found (R. 17):

> From a review of the evidence of record we conclude that the cost to the carrier of operating the trains involved greatly exceeds the benefit derived from said trains by the traveling public; that existing alternate transportation service by rail, bus, airline and motor truck are reasonably adequate for the transportation of passengers, and express; that the public will not be materially inconvenienced by the discontinuance of the service here involved; that the savings to be realized by the carrier outweigh the inconvenience to which the public may be subjected by such discontinuance; that such savings will enable the carrier more efficiently to provide transportation service to the public which remain in substantial demand; and that the continued operation of trains Nos. 13 and 16 would constitute a wasteful service and would impose an undue burden on interstate commerce.

A petition seeking reconsideration by the entire Commission was denied on August 6, 1962. At the same time, it was provided that the order of the Commission authorizing the discontinuance of passenger trains 13 and 16 (which had been postponed pending

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disposition of the petition) should become effective 15 days after August 8, 1962 (R. 20–21).

On August 18, 1962, the State of North Carolina and other protestants instituted an action in the district court seeking to set aside and enjoin the report and order of the Commission. Thereafter, on October 19, 1962, the three-judge court issued its opinion and decree (R. 634). The decree (1) set aside and enjoined the Commission's order; (2) required the Southern to reinstate the service which had been discontinued pursuant to the Commission's order, and (3) "permanently and perpetually enjoined and restrained [the Southern] from discontinuing passenger trains, Nos. 13 and 16, between Greensboro and Goldsboro, North Carolina" (R. 658).

The court held, first, that the Commission's determination that continued operation of the two trains constituted a burden on interstate commerce and the Commission's view of the extent of this burden were infected with a legal error. "As a matter of law, we think that the ICC cannot be said to have made a proper finding unless it takes into account the profits the Southern Railway makes in its freight operations on the same intrastate line" (R. 640) and unless it determines, in this light, "whether the particular segment of the railway involved is contributing its fair share to the over-all company operations * * *" (R. 654). Then, instead of remanding for a redetermination free of what the court had held to be legal error, the court itself made factual findings that there was a net profit on the over-all operations of the line and that the profitability of this line

compared favorably to that of all system operations of the carrier (R. 653). "Taking into account total operation of this line, there is a profit not a loss, a benefit, not a burden" (R. 654). Finally, the court held that, in light of these findings and its own estimate of the public need for the services of the two trains (R. 648–653), there was no reason to remand the proceeding to the Commission for a determination whether discontinuance should be authorized. It could itself conclude that continuance was not warranted (R. 656). It therefore set aside the Commission's order and enjoined the railroad from discontinuing these trains without permitting the Commission to reconsider the proceeding in light of the court's opinion (R. 656–657).

SUMMARY OF ARGUMENT

I

In determining that the continued operation of Southern's passenger trains between Greensboro and Goldsboro would constitute an undue burden on interstate commerce, the Interstate Commerce Commission was not required to consider the carrier's profits from the operation of freight trains between the same two points. Section 13a was enacted in 1958 to lessen the railroads' burden of huge passenger deficits by empowering the Commission to authorize the discontinuance of specific deficit services for which there was no longer a substantial public need. The language of Section 13a(2) requires the Commission to determine whether the continued operation of particular services ("such train") will constitute an

unjust and undue burden upon interstate commerce. It does not require the Commission to determine the existence of a burden on the basis of the operation of all freight and passenger trains on the line. This is at the heart of the purpose of Section 13a(2), which was intended to extend the Commission's then existing powers over abandonment of burdensome lines to enable the Commission to consider the burden of less than all the services on a line and to authorize the discontinuance of particular services. In thus extending the Commission's powers, the Congress chose language markedly similar to that applied by the courts under Sections 1(18)–1(20) and presumably intended that it be given a similar interpretation, *i.e.*, simply to require a comparison of the burden on an interstate carrier of continuing the particular deficit operations with the public need for those same operations. This was clearly the standard to be applied to interstate trains under Section 13a(1) and the use of identical language to describe the standard for intrastate trains under Section 13a(2) confirms Congress' purpose in this regard. Finally, there is no policy justification for making the propriety of discontinuing particular passenger trains conditional, not on the over-all financial strength of the carrier nor even on its intrastate profits, but on the wholly fortuitous factor of freight profits on the same line.

The court below misconstrued the relevance of Section 13(4) to the interpretation of Section 13a(2). While just prior to the Transportation Act of 1958 this Court had required the Commission to make find-

ings as to the over-all intrastate profitability of a carrier before treating particular local rates as burdens on interstate commerce, the Court had never imposed any such limitation on the Commission's abandonment powers under Sections 1(18)–1(20). See *Colorado* v. *United States*, 271 U.S. 153. It was presumably to the Commission's abandonment powers and not to its powers over rates that Congress looked in extending the authority of the Commission to authorize the discontinuance of less than all the services on a line. This is particularly clear because, in amending Section 13(4) to make unnecessary such an investigation of over-all intrastate revenue, Congress indicated that it was reinstating what it believed was always the intent of the statute. Moreover, even if Section 13a(2) were to be interpreted just as Section 13(4) had been interpreted prior to the Transportation Act of 1958, this would not explain or justify the decision below which required the Commission to consider freight profits on the same line, not the over-all profits from all intrastate operations.

II

If the court below had correctly found that the Commission was misapplying the relevant standards under Section 13a(2), the only appropriate disposition would have been to remand to the Commission for a determination of the necessary subsidiary facts and a new consideration of the balance of public need against the burden to interstate commerce. Instead, the court erroneously undertook to perform these functions itself. In so doing, and led astray

by its findings as to the profitability of combined freight and passenger revenues on the Greensboro-Goldsboro line, the court overturned the Commission's conclusion that the public need did not justify the continued deficit operation of passenger trains on this line. The Commission's conclusion was amply supported by the evidence and by its findings of subsidiary facts, which the court below made clear it was not overturning. In this situation the Commission's order should have been sustained. The decision below should, therefore, be reversed with directions to dismiss the complaint.

ARGUMENT

I

IN DETERMINING THAT THE CONTINUED OPERATION OF THE PARTICULAR PASSENGER TRAINS WOULD CONSTITUTE AN UNDUE BURDEN UPON THE INTERSTATE OPERATIONS OF THE RAILROAD AND UPON INTERSTATE COMMERCE, THE COMMISSION WAS NOT REQUIRED TO CONSIDER THE CARRIER'S PROFITS FROM THE OPERATION OF FREIGHT TRAINS BETWEEN THE SAME TWO POINTS

Section 13a(2) of the Interstate Commerce Act empowers the Commission to authorize a railroad to discontinue a train operated between points within a State, when such permission has been denied or withheld for 120 days by the State, if, after a hearing, the Commission finds (a) that the present and future public convenience and necessity permit such discontinuance and (b) that continued operation of "such train" will constitute an unjust and undue burden upon the interstate operations of the railroad or upon interstate commerce. In authorizing the Southern

Railway Company to discontinue two passenger trains operated between points in North Carolina, the Commission found that these trains were incurring an annual deficit of over $100,000. It held that this continuing deficit operation, the losses from which presumably would have to be made good by the total system profits of the carrier on its interstate as well as its other intrastate operations, constituted a burden on interstate commerce that Congress had directed it to remove if the burden was undue and not justified by the public convenience and necessity served by the operation. Reversing this holding, the court below held that, in determining (i) whether this operation constituted a burden on interstate commerce and (ii) the extent of the burden, the Commission erred in not taking "into account the profits that the Southern Railway makes in its freight operations on the same intrastate line" (R. 640). We submit that this holding of the court below is plainly incorrect in light of the purposes and history of Section 13a(2) and is unsound as a matter of regulatory policy.

A. SECTION 13a(2) WAS INTENDED TO EXTEND THE COMMISSION'S POWER UNDER SECTION 1(18)-1(20) SO THAT THE COMMISSION COULD AUTHORIZE THE DISCONTINUANCE OF A PART OF A CARRIER'S SERVICES ON A LINE WHEN THE LOSS ON THAT PART CONSTITUTED AN UNDUE BURDEN ON THE CARRIER AND THUS ON ITS INTERSTATE OPERATIONS

1. The Commission's power to authorize abandonment of intrastate lines prior to 1958

Since the enactment of the Transportation Act of 1920, Congress has been concerned with the effect of uneconomic railroad facilities and services upon the

national transportation system. In Sections 1(18) and 1(20) of that Act, Congress empowered the Commission to permit total abandonment of railroad lines, including lines which lie wholly within a State, where their continued operation would constitute a burden upon interstate commerce. *Colorado* v. *United States*, 271 U.S. 153; *Transit Commission* v. *United States*, 284 U.S. 360; *State of Illinois* v. *United States*, 213 F. Supp. 83 (N.D. Ill.) affirmed *per curiam*, 373 U.S. 378. The relationship between deficit operations on an intrastate line and a burden on interstate commerce was spelled out by Justice Brandeis in the *Colorado* case. "Prejudice to interstate commerce may be affected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce" (271 U.S. at 163). "Such depletion of the common resources in the local interest may conceivably be effected by continued operation of an intrastate branch in intrastate commerce at a large loss" (*ibid.*). Whether such continued operation constitutes a burden on interstate commerce was, the Court held, an issue appropriate for resolution by the Interstate Commerce Commission.[*]

[*] The Court stated (271 U.S. at 165–166):

"Because the same instrumentality serves both, Congress has power to assume not only some control but paramount control, insofar as interstate commerce is involved. It may determine to what extent and in what manner intrastate service must be subordinated in order that interstate service may be adequately rendered. The power to make the determination inheres in

The *Colorado* case involved the Commission's authorization of the abandonment of a particular branch line which had been operating at a substantial deficit. The State argued that the Commission's order could not be upheld because the Commission had not found that "by continued operation of the branch * * * the Company will be prevented from earning a fair return on the value of its properties as a whole, or that the entire intrastate business in Colorado will not earn such a return" (271 U.S. 166). This Court rejected that argument saying "the Act does not make issuance of the certificate conditional upon a finding that continued operation * * * will result in a denial of just compensation for the use in intrastate commerce of the property of the carrier within the State. * * * The sole test prescribed is that abandonment be consistent with public necessity and convenience" (271 U.S. 167–168). The Commission is simply directed to balance the needs of intrastate commerce for a particular line against the burden that the deficit operations of that line imposes on interstate commerce (*id.* at 168):

> The benefit to one of the abandonment must be weighed against the inconvenience and loss to which the other will thereby be subjected. Conversely, the benefits to particular communities and commerce of continued operation must

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the United States as an incident of its power over interstate commerce. The making of this determination involves an exercise of judgment upon the facts of the particular case. The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission."

> be weighed against the burden thereby imposed upon other commerce. * * * The result of this weighing—the judgment of the Commission—is expressed by its order granting or denying the certificate.

Since 1920, thousands of miles of railroad track have been abandoned in response to changed conditions in population, distribution, competition, etc. In exercising its jurisdiction over railroad abandonments, the Commission has never been precluded from authorizing abandonment of a particular uneconomic branch line merely because the remainder of the railroad's intrastate operations were profitable. See *Transit Commission* v. *United States,* 284 U.S. 360; *Georgia* v. *United States,* 28 F. Supp. 749 (E.D. Va.); cf. *North Carolina* v. *United States,* 124 F. Supp. 529 (M.D. N.C.); *Moeller* v. *Interstate Commerce Commission,* 201 F. Supp. 583 (S.D. Iowa); *State of Illinois* v. *United States,* 213 F. Supp. 83 (N.D. Ill.), affirmed *per curiam* 373 U.S. 378.

2. The enactment of Section 13(a)(2) as part of the Transportation Act of 1958

While the Interstate Commerce Commission had plenary power under Sections 1(18) to 1(20) to authorize the abandonment of *all* operations over particular railroad lines, prior to 1958 it was totally without statutory power to authorize a railroad to discontinue the operation of particular trains or services, leaving in operation the other trains or services on the particular line. *Board of Public Utility Commissioners of New Jersey* v. *United States,* 158 F. Supp. 98 (D.N.J.), dismissed as moot, 359 U.S. 982; *New Jersey*

v. *New York, S. & W. R. Co.*, 372 U.S. 1, 5. In the absence of federal regulation, many States had asserted and exercised authority over the discontinuance of both interstate and intrastate passenger trains. It was in order to fill this gap in the Commission's authority that Section 13(a)(2) was added to the Interstate Commerce Act in 1958.

In the years following 1920, the development of private and commercial motor passenger transportation and of air transportation modified to a very considerable extent the nation's reliance upon railroad passenger service. By 1957 intercity passenger traffic in the United States consisted of rail 3.7 percent, motorbus 3.5 percent, private automobile 88.7 percent, and air 3.9 percent. Coincident with the decline in public reliance upon rail passenger service, that service began, in 1930, to produce substantial deficits which were interrupted only in the World War II years. *Railroad Passenger Train Deficit*, 306 I.C.C. 417, 419, 429, 486–487). And see *King* v. *United States*, 344 U.S. 254. According to the Commission's studies, by 1956 the passenger losses amounted to approximately $700 million annually. (S. Rep. 1647, 85th Cong., 2d Sess., p. 9). Inevitably, the alleviation of the railroad passenger deficit became one of the principal concerns of the Congress when it again turned to railroad problems.

The impact of these trends upon the overall financial position of the railroads was described in 1958 by the House Committee on Interstate and Foreign Commerce (H. Rep. 1922, 85th Cong., 2d Sess., pp. 11–12)

in discussing the provision of the 1958 legislation which became Section 13a:

> A major cause of the worsening railroad situation is the unsatisfactory passenger situation. Not only is the passenger end of the business not making money—it is losing a substantial portion of that produced by freight operations.
>
> * * * * *
>
> It is obvious that in very great measure these passenger losses are attributable to commuter service. * * * It is unreasonable to expect that such service would continue to be subsidized by the freight shippers throughout the country.
>
> There are substantial losses, however, occurring in passenger service beyond those attributable solely to commuter service. Where this passenger service * * * cannot be made to pay its own way because of lack of patronage at reasonable rates, abandonment seems called for.

Similarly, the Senate Committee on Interstate and Foreign Commerce, in discussing the legislation, found that (S. Rep. 1647, 85th Cong., 2d Sess., p. 21):

> A most serious problem for the railroads is the difficulty and delay they often encounter when they seek to discontinue or change the operation of services or facilities that no longer pay their way and for which there is no longer sufficient public need to justify the heavy financial losses entailed. The subcommittee believes that the maintenance and operation of such outmoded services and facilities constitutes a heavy burden on interstate commerce.

An important cause of that burden was the "excessively conservative and unduly repressive" attitude

of state regulatory bodies "in requiring the maintenance of uneconomic and unnecessary services and facilities" (*id.* at 22). The proposed remedy was to fill the gap in the powers of the I.C.C. which prevented it from authorizing the discontinuance of particular uneconomic services and facilities unless *all* the operations on the line were such as to warrant abandoning the line entirely.

As these excerpts from the Committee reports show, the House and Senate Committees were firmly opposed to subsidization of losing operations (such as passenger trains) out of revenues from other more profitable services (such as freight). During the legislative development of Section 13a, the major issue was not whether the Commission should be *empowered* to determine that losses from particular passenger services, balanced against the public need for such services, constitute an undue burden, but whether the Commission should be *required* to permit the discontinuance of any train operated at a "net loss" regardless of the need for the service. As originally reported by the Senate Committee, the bill (S. 3778, 85th Cong., 2d Sess., pp. 5, 6) would have authorized any railroad to discontinue or change the operation or service of any train or ferry engaged in transportation "in interstate, foreign and intrastate commerce, or any of them," unless the Commission found after hearing that the operation or service of such train or ferry "is required by public convenience and necessity and that such operation or service will not result in a net loss therefrom to the carrier or carriers and will

not otherwise unduly burden interstate or foreign commerce." In other words, if the Commission found that the continued operation of a particular train would result in a "net loss" to the carrier, the Commission would have been required to permit discontinuance, regardless of the public need for the service. Senator Smather, Chairman of the Surface Transportation Subcommittee which held hearings on the bill, made it very clear that the "net loss" standard did not refer to all operations on a line or all operations intrastate but to "the loss from the particular operation the railroad is rendering" (104 Cong. Rec. 10849).

The Senate bill, as reported, was subjected to two forms of attack on the Senate floor. Senator Javits, fearing discontinuance of the deficit commuter operations upon which some large cities depend for mass public transportation, proposed an amendment to delete the "net loss" standard as an absolute basis for discontinuance, and to substitute a requirement that the Commission balance the public need for the service against the deficit resulting from it (104 Cong. Rec. 10846. See also pp. 10838–10839). He pointed out in support of his amendment (104 Cong. Rec. 10847–10848):

> * * * that the only criterion which is therein set forth is net loss * * * if it is a net loss, it does not matter whether or not it is construed as a burden on either interstate or foreign commerce. Therefore, if the Commission could find that public convenience and necessity required nonetheless, despite the fact of the net loss, operation of the particular commuter sec-

> tion which is sought to be discontinued, it is my view, as the bill is written, that it would have no legal power to require it. The discontinuance would be left to the entire discretion of the individual carrier.
>
> * * * * *
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> If the bill is amended in the way I have suggested in the amendment I have submitted, it will result in giving to the Interstate Commerce Commission a balanced authority to deal with the situation, both in respect to losses and in respect to the public in the way of convenience and necessity.

Senator Javits' amendment was rejected (104 Cong. Rec. 10849), and the "net loss" standard remained in the bill as passed by the Senate. Senator Russell, objecting that the bill "is a direct and drastic blow to the authority of the State regulatory bodies" (104 Cong. Rec. 10850), initially had more success. The bill was amended to limit the Commission's discontinuance authority to interstate trains (104 Cong. Rec. 10862, 10864)—a change made over the objection of some Senators that the amendment would discriminate against those States that rely on interstate rail service (which could be discontinued by the I.C.C.) and in favor of those States which rely more upon intrastate service (which, under the amendment, could not be discontinued by the I.C.C.). 104 Cong. Rec. 10855, Senators Bridges and Cotton.

The House Bill, H.R. 12832, 85th Cong., 2d Sess., contained the same criteria as the original Senate bill for determining when a discontinuance would be permissible, but, following the floor amendment to the Senate

bill, it did not authorize the Commission to permit the discontinuance of intrastate trains. The "net loss" standard was deleted from the House bill on the floor of the House as the result of an amendment proposed by Chairman Harris of the House Interstate Foreign Commerce Committee (104 Cong. Rec. 12547) for reasons similar to those expressed by Senator Javits (104 Cong. Rec. 12530, 12547–48). The Commission was not to be required by statute to authorize the discontinuance of *every* net loss operation. Factors of public convenience and necessity could override the importance of a net loss on a particular service. See 104 Cong. Rec. 12547–48, Representative Coad.

The bills passed by the House and Senate differed most significantly in the fact that the Senate had retained the "net loss" provision under which the I.C.C. would be required to authorize the discontinuance of any train running at a net loss. In conference, the "net loss" standard of the Senate bill was deleted in favor of the House proposal.[4] An

[4] When the Conference report was discussed and agreed to in the Senate, Senator Javits stated with regard to the criteria (104 Cong. Rec. 15529) that: "now the test provided by the bill as to the discontinuance of any commuter service—because that was what troubled us particularly—is that it would constitute an undue burden upon the operations of such carrier or carriers, or upon interstate commerce. As I construe that provision, the commission would have to look at the overall situation of the entire railroad in order to determine the inequity of requiring it to continue a particular commuter branch."

Senator Bricker, a member of the Senate committee, responded that "The question involves the relation between the commuter income and the income from the other services which the railroad renders" (*ibid.*).

additional and no less significant change was also made. The Commission's authority was expanded so that it again would cover the intrastate operations which had been eliminated by amendment on the Senate floor. Section 13a was split into paragraph (1) applicable to trains operated between points in different states, and paragraph (2) applicable to trains operated "wholly within the boundaries of a single state." The same standards were to be applied by the Commission under the two provisions to determine whether discontinuance was justified. There is a difference, however, in procedure. Under 13a(1) the Commission may order continuance of an interstate service which the carrier itself could otherwise discontinue, upon a determination that it is "required by public convenience and necessity" and "will not unduly burden interstate or foreign commerce."[7] Under 13a(2) the Commission may authorize discontinuance of an interstate service which is not required by "the present or future public convenience and necessity" and which "constitute[s] an unjust and undue burden * * * upon interstate commerce," but only after

[7] A railroad proceeding under Paragraph (1) of Section 13a must first file notices of the proposed discontinuance with the Interstate Commerce Commission, with the Governors of the States in which the train operates, and in every station served by the train. After 30 days, the railroad may discontinue the train unless the Commission has decided to investigate the discontinuance. The Commission may require the railroad to continue operations, pending its investigation, for an additional four months. It also may, at the conclusion of the investigation, order service continued for another year. *New Jersey v. New York, S. & W. R. Co.*, 372 U.S. 1, 3–4.

the appropriate commission has been given an opportunity to act and has failed or refused to authorize discontinuance. Senator Smathers later explained that Section 13(a)(2):

> protected the right of the States * * * by leaving to the State regulatory agencies the right to regulate and have a final decision with respect to the discontinuance of train service which originated and ended within one particular State, except when it could be established that intrastate service was a burden on interstate commerce. [104 Cong. Rec. 15528.]

In sum, the legislative history shows that Congress tempered, in two respects, the original purpose of the Senate bill to *require* the Interstate Commerce Commission to authorize the discontinuance of every interstate or intrastate train or service operating at a net loss: (1) by allowing the Commission to balance the public need for the train or service against the burdens caused by the operating deficit; and (2) by giving the States an opportunity to pass upon the discontinuance of an intrastate service before the carrier could petition the Interstate Commerce Commission. But the inquiry was to be directed at the particular service and not the line as a whole.

B. A REQUIREMENT THAT THE INTERSTATE COMMERCE COMMISSION DETERMINE THE EXISTENCE OR EXTENT OF THE BURDEN OF DEFICIT PASSENGER OPERATIONS ON INTERSTATE COMMERCE ONLY AFTER OFFSETTING FREIGHT PROFITS ON THE SAME LINE IS INCONSISTENT WITH THE PURPOSES OF SECTION 13a(2)

The language and history of Section 13a(2) make entirely clear that profits from freight services upon a particular line need not be considered in determining

whether passenger services on that line constitute a burden on interstate commerce. The Commission may authorize discontinuance of trains if it finds two things. First, it must find that the discontinuance would be consistent with present or future public convenience and necessity. This standard invokes the basic principle underlying the abandonment provisions of Section 1(18)–(20), i.e., "the benefits * * * of continued operation must be weighed against the burden * * *". *Colorado* v. *United States*, 271 U.S. 153, 168. Second, the Commission must find that "the continued operation of *such train* * * * will constitute an unjust and undue burden upon the interstate operations of such carrier * * * or upon interstate commerce" (emphasis added). Clearly, it is the burden or loss resulting from continued operation of *"such train"* that is to be balanced against the public's need for the train service. Section 13a(2) contains no suggestion that "unjust and undue burden" can be found to exist only after taking into account profits from other service on the same segment of line.

That the burden resulting from continued operation of "such train" (and not the burden associated with all passenger and freight services on the line) is to be balanced against the public's need for the train service, is at the very heart of the 1958 Amendments. Before the addition of Section 13a(2), the I. C. C. already had authority, under Section 1(18)–1(20), to authorize the discontinuance of *all* services on an intrastate line when the net effect of continuing these services was to impose an undue burden on interstate

commerce. *Colorado* v. *United States*, 271 U.S. 153. The basic objective of the 1958 Amendments was to add to this the power to authorize the discontinuance of less than all the services and trains on a particular line when the trains or services to be eliminated impose a burden on the interstate operations of the carrier which is undue as measured against the public convenience and necessity they serve. Construing Section 13a(2), as the court below did, to require consideration of the overall burden caused by all operations on a line rather than of the burden of particular services or trains, frustrates this purpose and renders Section 13a(2) largely redundant.

Indeed, it is clear from the history of Section 13a(2) that Congress did not intend to condition the Commission's power to find a burden on interstate commerce even upon a showing of an overall burden from all intrastate operations, much less to condition it upon a showing of a burden from the sum of those operations that happen to take place upon the same piece of track. As noted above, this Court had considered and squarely held that the Commission need not find that overall intrastate operations of a carrier were not paying their way in order to authorize the abandonment of a particular intrastate line. *Colorado* v. *United States*, 271 U.S. 153, 167–168. This decision had been followed consistently by the federal courts. See *Georgia* v. *United States*, 28 F. Supp. 749 (E.D. Va.) and the other cases cited *supra*, p. 14. Congress presumably intended the same standards to apply when, using language markedly similar to that applied by the courts under Section 1(18)–1(20), it extended

the Commission's authority to fill the gap in the Commission's power left by that section; for the only suggested change in that standard was one that would have made any net loss on the operations of any train the occasion for a mandatory authorization of discontinuance. Certainly there is no reason to assume that, without any discussion, Congress intended to specify a different standard requiring recourse to the results of overall intrastate operations when, at the very same time, it was amending Section 13(4) to make clear that the Commission could find that a particular intrastate rate imposed an undue burden on interstate commerce "without a separation of interstate and intrastate * * * revenues * * * and without considering in totality the operations * * * of any carrier * * * wholly within any State."

The fact that Congress did not require the Commission to give effect to the profits from other services on the same line is also apparent from a comparison of 13a(1) and 13a(2). Seeking to protect the interstate railroad system from the immense losses resulting from uneconomic passenger services, Congress prescribed standards substantially identical to those applied in the *Colorado* case to govern the discontinuance of both "interstate" and "intrastate" trains. Thus, under Section 13a(1), the Commission may require a railroad to operate a train between points in different States only if it finds that the operation of "such train" "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce." In the case of Section 13a(1) the undue burden is incontestably that flowing from the opera-

tion of "such train"—not the burden which would result from an overall loss from all operations on the particular interstate line. Since Congress authorized the Commission to apply the same standards in determining whether to authorize discontinuance of "intrastate" trains, there is no basis for the lower court's holding that the Commission is required under Section 13a(2) to consider the overall results of all operations on the intrastate line.

Finally, a requirement that the Commission consider profits from other operations on the same line has no justification in regulatory policy, for the profitability of other services between the two points where a deficit operation is conducted is a wholly fortuitous factor which cannot properly be given any weight in determining the need for continuing the deficit operation. The profitability of freight service on the line on which the passenger trains are operated bears no practical relationship either to the public's need for the passenger services or to the burden which the passenger deficit imposes on interstate commerce. If the public's need for continuance of particular deficit passenger services is so great that these services should, if possible, be subsidized by the carrier (*i.e.*, by its security holders or indirectly by shippers of freight), then the carrier's ability to do so should be determined by looking to the results of its total operations, not just to the results of its freight operations on the same line. If the public's need for the deficit passenger service is outweighed by the burden of that service on the carrier and its interstate operations, then the passenger service should not be con-

tinued merely because of a showing that, entirely fortuitously, freight operations on that particular segment of line are unusually profitable. Similarly, the burden of deficit passenger services on the interstate operations of a carrier is no less if some of the carrier's more profitable freight operations are conducted on the same track used by the passenger trains than if this profit is made on other segments of track or line. There is thus no justification for considering freight profits on the particular segment of railroad line in determining whether the deficit operations of passenger trains on that line constitute an undue burden on interstate commerce.

C. THE LOWER COURT'S CONTRARY CONCLUSION WAS BOTTOMED ON MISTAKES AS TO THE RELEVANCE OF SECTION 13(4) AND AS TO THE LIKELIHOOD OF DISCRIMINATION AGAINST INTERSTATE TRAFFIC

In concluding that Section 13a(2) requires the Commission to consider the net results of all operations on a line before authorizing the discontinuance of certain trains on that line, the court below relied primarily on what it conceived to be the import for Section 13a(2) of this Court's construction of the somewhat different standards of Section 13(4) relating to rates prior to its amendment in 1958. In *Chicago, M., St. P. & P.R. Co.* v. *Illinois,* 355 U.S. 300, and *Public Service Commission of Utah* v. *United States,* 356 U.S. 421, this Court had held that findings with respect to the results of all intrastate operations are a necessary predicate for a conclusion that particular intrastate rates are causing an unfair discrimination against interstate commerce. The court below stated that 13a(2) cases

"stand in an a fortiori relationship to Section 13(4) cases," which it referred to as "the existing law applicable to discontinuance cases" (R. 641, 642). Although it recognized that, by the 1958 Transportation Act, Congress had amended Section 13(4) to make unnecessary such findings as to the overall results of intrastate operations, the court noted that similar language was not added to the proposed Section 13a(2) and therefore concluded that the "existing law" remained in effect.

We submit that there are three basic errors in the lower court's reasoning. First, there was no existing law applicable to discontinuance cases prior to 1958 for Section 13a was added in that year. The relevant question is therefore not whether Congress intended to change "the existing law" of 13a(2) when it amended Section 13(4) but whether Congress intended to impose on 13a(2) the very standards which it was, at the same time, eliminating from 13(4).

Second, at the time it enacted Section 13a(2) in 1958 Congress was plainly aware of the many abandonment cases under Section 1(18)-1(20) which had made clear that a finding that the overall results of intrastate operations were a burden to interstate commerce was *not* a necessary predicate to authorizing the abandonment of an intrastate line. See *Colorado* v. *United States,* 271 U.S. 153, 166–170, and the discussion *supra* at pages 11–14. It was presumably this line of cases and not the recent *Chicago* and *Utah* rate decisions under Section 13(4) to which Congress intended to assimilate the extension of the

Commission's abandonment powers which was to be accomplished by Section 13a(2). Moreover, when Congress amended Section 13(4) to make clear that the Commission need not determine the overall results of intrastate operations, Congress plainly meant to be returning to what it conceived as the original intent of Section 13(4), and not to be supplying a "new" meaning to that Section: "[I]t is the possible interpretation of these recent court decisions that would create a change in the present regulatory scheme." H. Rep. 2274, 85th Cong., 2d Sess., pp. 11–12.

Third, even if the court below were correct in construing the 1958 amendment to Section 13(4) as requiring the Commission, in dealing with intrastate rates, to consider proffered evidence as to the net results of the railroad's total operations within a particular State, that proposition would still be wholly unrelated to the lower court's conclusion that in determining under Section 13a(2) whether to authorize discontinuance of Southern's passenger train service between Greensboro and Goldsboro, the Commission must take into account Southern's "profit" from freight operations on the Greensboro-Goldsboro line (as distinguished from the totality of its intrastate operations in North Carolina). Nothing in the history and application of Section 13(4) or in the language or history of Section 13a(2) suggests that any weight is to be given to the totality of operating results upon a particular segment of railroad track.

In support of its contrary view, the court below also reasoned (R. 641) that:

> If the ICC is then to cut off all of the intrastate operations that suffer a loss, while retaining all others, the result would be to require the intrastate operations to bear more than their share. The intent of Congress was to prevent burdens on interstate commerce, not require tribute therefor.

The answer to this is that the Congress, seeking to protect the interstate railroad system from huge losses resulting from uneconomic passenger services, has prescribed the same standards to govern the discontinuance of both "interstate" and "intrastate" trains. Thus, under Section 13a(1), the Commission may require a railroad to operate a train between points in different States only if it finds that the operation of "such train" "is required by public convenience and necessity and will not unduly burden interstate or foreign commerce." As in Section 13a(2), the undue burden is that flowing from the operation of "such train"—not the burden which would result from an overall loss from all operations on the particular interstate line. Since the Commission is to apply the same standards in determining whether to authorize discontinuance of both "interstate" and "intrastate" trains, there is no basis for the lower court's suggestion that the Commission's action here would "require the intrastate operations to bear more than their share."

II

THE COMMISSION PROPERLY DETERMINED, ON THE BASIS OF SUBSTANTIAL EVIDENCE BEFORE IT, THAT THE CONTINUED OPERATION OF THE TWO PASSENGER TRAINS AT A SUBSTANTIAL DEFICIT CONSTITUTED AN UNDUE BURDEN ON THE RAILROAD'S INTERSTATE OPERATIONS AND ON INTERSTATE COMMERCE AND THAT DISCONTINUANCE WAS CONSISTENT WITH THE PUBLIC CONVENIENCE AND NECESSITY

Assuming, as we do, that the lines of inquiry pursued by the district court were not relevant under the statute, *i.e.*, that there is no necessity to consider freight profits from other trains on the line, the Commission's findings, we submit, are supported by substantial evidence and its conclusions fully warranted.[8]

The Commission found the following basic facts. In 1948, both trains carried 56,739 passengers, an average of 77.51 per trip, as compared with a total of 14,776, or an average of 20.19 per trip in 1960, the last full year for which figures were available (R. 31). During the same period, total passenger revenues declined from $60,534, or an average passenger revenue of $82.70 per trip, to $21,135 or $28.87 per trip (R. 31). In 1960 the average number of passengers per train mile was 7.33 while a five-man railroad crew was necessary to operate each train's diesel engine and passenger cars (R. 29–30). In the same year the direct expenses of operating these trains was over three times their total revenue (R. 31). While only a total of

[8] The district court's view that the Commission's conclusions were unwarranted (see R. 656–657) was inevitably influenced by its holding that, considering revenues from freight traffic, there was "a profit not a loss, a benefit, not a burden" (R. 654).

14,776 passengers were carried on both trains in 1960, it was estimated that an additional 82,000 passengers would be required to enable the trains to break even (R. 40). Despite some "increase in patronage in the first five months of 1961, passenger revenues during that period amounted to * * * $26,020 less than the wages of the train and engine crews" (R. 40). The discontinuance of the two trains would result in net savings to the carrier of at least $90,589 per year (R. 39).

The need shown for these trains was found to be "relatively insubstantial when viewed in the light of the density of the population of the area served" (R. 40). The Commission also found "that existing alternate transportation service by rail, bus, airline and motor truck are reasonably adequate for the transportation of passengers, and express" (R. 17). See *supra*, p. 4, n. 4. "For most of the major communities, alternate passenger service is available by bus and by air and 4 communities have rail passenger service. Only 3 small communities would be left wholly without bus service" (R. 40–41). The Commission and examiner both found that the discontinuance of passenger services would not seriously affect the industrial growth of the area (R. 17, 41).

We submit that, on the basis of these findings, the Commission could properly make the determinations of undue burden and consistency with the public convenience and necessity which are necessary to justify discontinuance of a train under Section 13a(2) and could fairly conclude (R. 17):

> that the savings to be realized by the carrier outweigh the inconvenience to which the public may be subjected by such discontinuance; that such savings will enable the carrier more efficiently to provide transportation service to the public which remain in substantial demand; and that the continued operation of trains Nos. 13 and 16 would constitute a wasteful service and would impose an undue burden on interstate commerce.

Indeed, on strikingly similar facts in a case involving abandonment of a portion of a branch line, Judge Parker wrote for a three-judge court that "[a] finding that the Commission has abused its discretion in the matter would clearly not be warranted, and in the absence of such finding it is well settled that we may not substitute our judgment for that of the Commission." *North Carolina* v. *United States*, 124 F. Supp. 529, 532 (M.D. N.C.).

In reaching these conclusions the Commission did not disregard any factor which it should properly consider in a case such as this. The examiner and the Commission considered, but gave "little or no weight" (R. 38) to the overall prosperity of the carrier. This was plainly within the discretion of the Commission. As the legislative history set forth above indicates (*supra*, p. 20, n. 6), Congress recognized that overall system profits of a carrier would be one of the factors the Commission could consider in an appropriate case in balancing a definite and substantial need for continuance of a particular service against the burden this continuance would impose on interstate commerce or

the interstate operations of the carrier.[9] But the prosperity of the carrier need not be considered in every case, for it cannot itself justify the continuance of a deficit service for which there is very little public need. Otherwise, the strength of prosperous railroads could be sapped by the aggregate effect of many relatively small deficit operations for which there was little public need—a result obviously never intended by Congress. Thus, while the Commission has recognized that the overall financial position of a railroad may be taken into account in determining whether it should be required to continue deficit passenger services for which there is a definite and substantial need (see, *Louisville & N.R. Co. Discontinuance of Service,* 307 I.C.C. 173), in the present case the public need was slight and therefore the fact that the Southern is financially strong was properly held to be unimportant. *City of Philadelphia* v. *United States,* 197 F. Supp. 832 (E.D. Pa.); *State of Montana* v. *United States,* 202 F. Supp. 660 (D. Mont.); *People of the State of California* v. *United States,* 207 F. Supp. 635 (N.D. Calif.).

[9] Even without regard to the history of Section 13a(2), the potential relevance of this factor had been recognized in the application of Section 1(18)–1(20) to petitions to abandon particular lines. Thus, in *Colorado* v. *United States,* 271 U.S. 153, 168–169, Justice Brandeis had pointed out that, "In some cases, although the volume of the whole traffic is small, the question is whether abandonment may justly be permitted, in view of the fact that it would subject the communities directly affected to serious injury while continued operation would impose a relatively light burden upon a prosperous carrier."

The Commission thus reached the conclusions made determinative by the statute on the basis of substantial evidence in the record and without disregarding any factor it is required to consider in a case such as this. Insofar as the contrary conclusions of the court below do not wholly depend upon its finding that interstate commerce *benefited* from the combined freight and passenger operations on this line, the court's decision involves a complete substitution of its own judgment for that of the Commission. The court gave greater weight to an increase in passenger traffic for the first five months of 1961 (R. 653) than had the Commission and the examiner, who had noted that the increase was largely due to movement of school children and left passenger revenues still far short of train and engine crew wages (R. 16, 40). The court gave weight to its finding that Southern had failed to seek passengers (R. 653) while the Commission noted that "prospective patrons who must be coaxed to use a service have no urgent need for it" (R. 16–17). The court gave greater weight than the Commission to the effects of passenger service on industrial growth (R. 17, 651). The court determined that, despite the existence of alternate passenger transportation service by rail, bus, and air, the loss of Southern's passenger service should be given substantial weight because "the existence of *alternative* modes of travel in a heavily populated area should be considered a 'convenience,' and under some circumstances (such as air line strikes and bad weather) a 'necessity'" (R. 653). The Commission, it is apparent, believed that the desirability of

such standby services could not justify maintaining the deficit operations of these trains.[10]

The foregoing does not exhaust the list of points on which the court substituted its judgment for the Commission's on questions committed by Congress to the Commission's discretion. It clearly demonstrates, however, that the court set about to resolve—in its own way—the question it posed: "What then is the public convenience and necessity to be served by this railroad" (R. 648). In resolving this question *de novo* the court repeatedly drew unwarranted inferences from the testimony of the protesting witnesses.

Thus, the court apparently gave considerable weight to the testimony of the Director of Transportation for Burlington Industries, Inc., to the effect that "30-40 employees of Burlington Industries are 'regular' users, averaging approximately one trip a month each" (R. 649, fn. 9). On cross-examination, the wit-

[10] A broad study and investigation by the Commission in 1959 has led it to conclude that "public convenience and necessity" does not require the maintenance of deficit passenger services as a standby service for travellers who customarily travel by highway or by air:

"This record does not indicate that the railroad industry has the financial ability to retain any of its service or facilities solely as standby capacity. Those who benefit from any standby capacity that should be maintained must assume the obligation of financing such standby service to the extent of their needs" (*Railroad Passenger Train Deficit*, 306 I.C.C. 417, 482).

To the extent that the court below implied that passenger trains must be maintained as a standby service for those who customarily use other modes of transportation, this would mean that passenger trains could never be discontinued in heavily populated areas.

ness revised his estimate to about five who may use the train about once a month, and could not think of any other employees of Burlington who use the train service with greater frequency (R. 474, 476). Again, the district court refers to two students at Duke University who "testified as to their and other students' use of the trains" (R. 649). The two students were posted at the Durham train station for a period of 7 days prior to the opening of school to greet incoming first-year students using the trains. The testimony was that during the 7-day period a total of 37 students got off the train (R. 215-217). Significantly Duke University has a total enrollment of about 5,000 students (R. 216). The court recites that the President of Research Triangle Institute testified to the effect that the continuance of the train service "was extremely important to the proper functions of his organization" (R. 650). But another witness for the Institute, the Chairman of its Board of Governors (R. 185), candidly stated that the Institute which has an annual travel budget of over $13,000, spent $4,000 for air travel, but only $367 for train travel—without specifying how much of the latter was spent for travel on trains 13 and 16 (R. 193-194). And the court relies on the testimony of four civilian employees of the Army as to their view of the military need for these trains (R. 649), but it neglects the testimony of their commanding officer, who stated that "the normal individual with whom I am associated would probably travel by air" (R. 137).

But, in the final analysis, the district court's mistakes in assessing the elements of public interest are

merely symptoms of its far more basic error in usurping the responsibility of the Commission for performing these tasks. Where, as here, there is substantial evidence to support the Commission's findings as to the extent of patronage, the out-of-pocket losses incurred by the railroad in operating the trains, and the available alternative transportation, weighing those factors and drawing the ultimate conclusion as to the relation of the public need to the burden on the interstate carrier are functions entrusted to the Commission. *Colorado* v. *United States*, 271 U.S. 153, 165–166; *Transit Commission* v. *United States*, 284 U.S. 360; *Chesapeake & Ohio Ry. Co.* v. *United States*, 283 U.S. 35, 42; *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241; *Interstate Commerce Commission* v. *Union Pacific R.R. Co.*, 222 U.S. 541, 547–548.

CONCLUSION

As we have shown: the Commission did not err in interpreting or applying the statutory standards; the Commission's determinations were supported by substantial evidence; and the district court has made clear that it did "not set aside any of the subsidiary findings of fact made by the agency" (R. 657). In this situation we believe that no useful purpose would be served by further review in the district court. If, as we contend, the facts found by the Commission amply justified the Commission's order, the judgment below should be reversed with directions to dismiss the complaint.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
WILLIAM H. ORRICK, JR.,
Assistant Attorney General.
PHILIP B. HEYMANN,
Assistant to the Solicitor General.
ROBERT B. HUMMEL,
I. DANIEL STEWART, JR.,
Attorneys.

ROBERT W. GINNANE,
General Counsel,
H. NEIL GARSON,
Associate General Counsel,
Interstate Commerce Commission.

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APPENDIX

Section 13a(2) of the Interstate Commerce Act, 49 U.S.C. 13a(2) provides:

> (2) Where the discontinuance or change, in whole or in part, by a carrier or carriers subject to this chapter, of the operation or service of any train or ferry operated wholly within the boundaries of a single State is prohibited by the constitution or statutes of any State or where the State authority having jurisdiction thereof shall have denied an application or petition duly filed with it by said carrier or carriers for authority to discontinue or change, in whole or in part, the operation or service of any such train or ferry or shall not have acted finally on such an application or petition within one hundred and twenty days from the presentation thereof, such carrier or carriers may petition the Commission for authority to effect such discontinuance or change. The Commission may grant such authority only after full hearing and upon findings by it that (a) the present or future public convenience and necessity permit of such discontinuance or change, in whole or in part, of the operation or service of such train or ferry, and (b) the continued operation or service of such train or ferry without discontinuance or change, in whole or in part, will constitute an unjust and undue burden upon the interstate operations of such carrier or carriers or upon interstate commerce. When any petition shall be filed with the Commission under the provisions of this paragraph the Commission shall notify the Governor of the State in which such train or ferry is operated at least thirty days in advance of the hear-

ing provided for in this paragraph, and such hearing shall be held by the Commission in the State in which such train or ferry is operated; and the Commission is authorized to avail itself of the cooperation, services, records and facilities of the authorities in such State in the performance of its functions under this paragraph.

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